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IN THE

Supreme Court of the United States

No. [redacted] 139

OCTOBER TERM, 1961

STANLEY E. HENWOOD, RICHARD L. ROEMER, LEWIS M. POE, individually, as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE and as proxies of said Committee, JAMES V. ARMOGIDA, ROBERT G. BALLANCE, FRED A. BERSHARA, NATHANIEL R. DUMONT, JOE L. FOSS, WILLIAM D. LAWRY, ELMER M. LUTHER, JR., EDWARD H. McLAUGHLIN, CHARLES SODERSTROM, JOHN A. STEEL, CLARENCE L. SUMMERS, ROY L. WILLIAMS, LOUIS W. WULFEKUHLER, ALFRED T. ZODDA, individually and as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE, BERNARD F. GIRA, HERBERT J. PETERSEN and UNITED INDUSTRIAL CORPORATION, a corporation,

Defendants and Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION and UNITED INDUSTRIAL CORPORATION,

Plaintiffs and Respondents.

PETITION FOR CERTIORARI.

MORRIS LAVINE,
215 West Seventh Street,
Suite 620,
Los Angeles 14, California,
Attorney for Petitioners.

VAUGHAN, BRANDLIN, ROBINSON & ROEMER,
411 West Fifth Street,
Los Angeles, California.
As of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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No. .....

OCTOBER TERM, 1961.

STANLEY E. HENWOOD, RICHARD I. ROEMER, LEWIS M. POE, individually, as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE and as proxies of said Committee, JAMES V. ARMOGIDA, ROBERT G. BALLANCE, FRED A. BERSHARA, NATHANIEL R. DUMONT, JOE L. FOSS, WILLIAM D. LAWRY, ELMER M. LUTHER, JR., EDWARD H. McLAUGHLIN, CHARLES SODERSTROM, JOHN A. STEEL, CLARENCE L. SUMMERS, ROY L. WILLIAMS, LOUIS W. WULFEKUHLER, ALFRED T. ZODDA, individually and as members of the UNITED INDUSTRIAL CORPORATION STOCKHOLDERS' PROTECTIVE COMMITTEE, BERNARD F. GIRA, HERBERT J. PETERSEN and UNITED INDUSTRIAL CORPORATION, a corporation,

Defendants and Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION and UNITED INDUSTRIAL CORPORATION,

Plaintiffs and Respondents.

PETITION FOR CERTIORARI.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Stanley E. Henwood, Richard I. Roemer and Lewis M. Poe, individually and members of the United Industrial Corporation Stockholders' Protective Committee, and as proxies of said Committee, respectfully petition this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse the judgment and orders of that court and, in respect thereto, set forth as follows:

Jurisdiction.

Jurisdiction is conferred by Title 15, Section 78aa, U. S. Codes, and Title 28, Section 1254(1), U. S. Codes. The decision of the United States Court of Appeals for the Ninth Circuit was rendered January 17, 1962. A petition for rehearing and a petition for modification of the same were duly filed within the time permitted by law and the rules of that court and were denied February 28, 1962. This petition for certiorari is filed within ninety (90) days of the denial of the petition for rehearing and of the motion to modify the Circuit Court's judgment.

Constitutional Provisions, Statutes and Regulations Involved.

Title 15, Section 78n(a) provides as follows:

> "It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Regulations (Text in Appendix).

Regulation 14(a)-9 Under the Securities and Exchange Act of 1934:

Rule 14a-9. False or Misleading Statements. (In full in Appendix).

Rule 14a-11. In Appendix.

First Amendment to the United States Constitution.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press;"

Fifth Amendment to the United States Constitution.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Opinion Below.

The opinion below is printed in Appendix "A." It is reported in 298 F. 2d 641 (1962) (March 26, 1962 Edition Adv. Sheets).

Facts.

United Industrial Corporation is a Delaware corporation. It has been engaged in certain type of manufacturing relating to defense work. The securities of United Industrial Corporation are widely distributed among 15,000 stockholders. Until January 16, 1961, its stock was listed and registered on the New York Stock Exchange and the Pacific Coast Stock Exchange. It

commenced operations in January of 1960 as a result of a merger of Topp Industries Corporation, a Delaware corporation, and United Industrial Corporation, a Michigan corporation. The surviving corporation, Topp Industries Corporation, thereafter changed its name to United Industrial Corporation. Bernard F. Gira was President of the corporation and Herbert J. Petersen was Executive Vice President. Both had been the principal officers of Topp Industries Corporation and succeeded themselves in the United Industrial Corporation during the year 1960.

It appeared that there would be write downs and adjustments of various sums received by the corporation. It was estimated that these write downs and adjustments might be within the vicinity of $6,000,000.00 to $7,000,000.00. During the course of meetings of the Board of Directors, it was suggested by other members of the Board of Directors that Gira and Petersen resign as officers and that such resignation would facilitate the pending study and adjustment of the corporations' accounts.

At the culmination of three (3) days' meeting, on January 14, 1961, Gira and Petersen tendered their resignations. Gira and Petersen together held approximately 100,000 shares of stock in the company which represented a major part of their personal assets. Gira conferred with Richard I. Roemer, an attorney with the firm of Vaughan, Brandlin & Baggot [R. T. 214-215]. Roemer and J. J. Brandlin met with Gira and discussed their problem. Gira and Petersen stated at

this meeting that they were not interested in any proxy contest [R. T. 1246-1249; Ex. 33, pp. 192-193]. At this meeting Brandlin indicated that the *firm* might be interested in handling a *proxy* contest for *other* interested stockholders. This would depend on whether he was able to organize a slate of *outstanding business men*. Brandlin also stated that the firm would need a stockholders' list. Gira indicated that he and Petersen had such a list and that they would let Brandlin use it [R. T. 1248-1250]. Two (2) days later, they delivered a stockholders' list to Roemer. (Management, of course, at all times, had such a list.)

The selection of the Stockholders' Protective Committee was made by Attorneys Brandlin and Roemer [R. T. 234-235, 1340-1341, 324-328, 1341-1342]. After the selection of the stockholders' committee of prominent citizens, proxy solicitation material was prepared and submitted on March 13, 1961 to the Securities and Exchange Commission for their clearance [R. T. 277-278, 302, 1797-1798]. The Securities and Exchange Commission staff indicated they wanted to take testimony of various members of the committee for determining the adequacy and accuracy of the proxy solicitation material of the Stockholders' Protective Committee [R. T. 1166-1169; Ex. 29-39, 42]. These proceedings ran concurrently in Washington, D.C. and Los Angeles, California for five (5) days [R. T. 1279]. After three (3) hearings, the Securities and Exchange Commission cleared the material.

Proxies by the Stockholders' Protective Committee of fifteen (15) well-known persons, including leading industrialists, were thereafter distributed in fifty (50) states of the union and several foreign countries at considerable expense. The proxies sent out to the stockholders of record were in two forms, as follows:

"United Industrial Corporation
Proxy Solicited by Stockholders' Protective Committee
Annual Meeting of Stockholders
To Be Held May 10, 1961

The undersigned hereby appoints Stanley E. Henwood, Richard I. Roemer, and Lewis M. Poe, and each of them, with full power in each of them to act without the others and with full power of substitution, the Proxy Agents of the undersigned to vote at the Annual Meeting of Shareholders of UNITED INDUSTRIAL CORPORATION presently set to be held at the offices of the corporation at 100 West Tenth Street, Wilmington, Delaware, at 11:30 a.m. on the 10th day of May, 1961, and at all adjournments, continuances, and any and all other changes of date thereof, all shares of common and preferred stock of such corporation which the undersigned could vote if personally present, cumulatively for the election to the Board of Directors of the corporation of any or all of the nominees named in the Proxy Statement of the Stockholders' Protective Committee dated March 27, 1961 (receipt of which is hereby acknowledged), and on any other business that may properly come before such meeting. The undersigned hereby revokes any proxy or proxies

heretofore given with respect to these shares of stock.

Dated, this ..... day of ....., 1961.

.....

.....

[Signature of Stockholder(s)]

Note: Jointly owned stock should be signed by all owners.

(If executed by an attorney-in-fact, the authorizing instrument or a certified copy thereof must accompany the proxy.)

Form 100F"

"United Industrial Corporation
Proxy Solicited by Stockholers' Protective Committee
Meeting of Stockholders
Presently Set to Be Held July 27, 1961

The undersigned hereby appoints Stanley E. Henwood, Richard I. Roemer, and Lewis M. Poe, and each of them, with full power in each of them to act without the others and with full power of substitution, the Proxy Agents of the undersigned to vote at the Meeting of Shareholders of UNITED INDUSTRIAL CORPORATION presently set to be held at the offices of the corporation at 100 West Tenth Street, Wilmington, Delaware on the 27th day of July, 1961 (whether such meeting be designated an annual, special, adjourned, postponed or continued meeting, or as it may be otherwise designated, and in any event the

next meeting of stockholders for the election of directors), and at all adjournments, postponements, continuances, and any and all other changes of date thereof, all shares of common and preferred stock of such corporation which the undersigned could vote if personally present, cumulatively for the election to the Board of Directors of the corporation of any or all of the nominees named in the Proxy Statement of the Stockholders' Protective Committee dated March 27, 1961 (receipt of which is hereby acknowledged), and on any other business that may properly come before such meeting. Proxies received by the Committee pursuant to this solicitation will be voted for the election as directors of the company of the nominees listed therein, or for so many of them, and in such order as the Proxy Agents in their discretion may determine. If any nominee shall become unavailable for election for any reason, which is not now foreseen, the proxies will be voted for the election of some other qualified person. The undersigned hereby revokes any proxy or proxies heretofore given with respect to these shares of stock.

Dated ....., 1961.

.....

.....

[Signature of Stockholder(s)]

Note: Jointly owned stock should be signed by all owners.

(If executed by an attorney-in-fact, the authorizing instrument or a certified copy thereof must accompany the proxy.)

Form 300"

As a result of their solicitations of proxies, the Stockholders' Protective Committee obtained proxies for approximately 1,200,000 shares of stock, or a practical majority of the stock of the corporation to vote at the annual election. The annual meeting was postponed from time to time, first at the request of the Company and the Securities and Exchange Commission and later the court postponed the proceedings from time to time, including the United States Court of Appeals for the Ninth Circuit, pending the appeal, and until sixty days after its judgment became final.

Although the Securities and Exchange Commission had cleared the material, the Securities and Exchange Commission petitioned the court to *void* the proxies obtained by the Stockholders' Protective Committee at considerable cost because it alleged in a complaint that the proxy material had failed to state

"(i) that the defendants, Bernard F. Gira and Herbert J. Petersen, were instrumental in initiating and organizing the United Industrial Corporation Stockholders' Protective Committee and in formulating on behalf of said committee a slate of directors of United Industrial Corporation in opposition to the slate of directors formulated by the management of United Industrial Corporation;

"(ii) omitted to state that the defendants Bernard F. Gira and Herbert J. Petersen have participated with representatives of the Stockholders' Protective Committee and aided said Committee and its representatives in conducting proxy solicitations in opposition to the management of UIC;

"(iii) stated that the defendants Bernard F. Gira and Herbert J. Petersen are not participating

with the Stockholders' Protective Committee in soliciting proxies in opposition to the management of UIC;

"(iv) stated that the formation of the Stockholders' Protective Committee was initiated solely as a result of complaints of the defendants Elmer J. Luther, Jr. and Roy L. Williams; and,

"(v) stated that certain losses sustained by UIC and diminution of stockholders' equity occurred during the time that Bernard F. Fein was Chairman of the Executive Committee."

The Findings of the District Court were actually drawn by the attorney for the S. E. C. Many of the findings are not sustained by the evidence.

But if all the findings were conceded they would not be sufficient to forfeit proxies without the knowledge or consent or wish of the proxy givers, and without specific congressional legislation authorizing it, and probably not even with it under the First and Fifth Amendments, United States Constitution.

The District Court of the United States, Southern District of California, Central Division, nevertheless, voided the proxies.

On appeal, the United States Court of Appeals for the Ninth Circuit modified the findings and judgment of the District Court but sustained the order *voiding* the proxies. On petition for rehearing the appellants moved the Circuit Court of Appeals to allow them to send out letters to the stockholders who gave proxies informing them of the information which the Securities and Exchange Commission and Circuit Court stated had

been omitted and to ask the stockholders if they still wished to recall their proxies or to have the proxies voted. The Court of Appeals denied the motion on February 28, 1962, and denied rehearing on that date.

The Circuit Court, however, did order that any meeting of stockholders of United Industrial Corporation, except for the purpose of adjournment, be delayed until sixty (60) days after its decree became final. A motion before the Circuit Court on April 24, 1962 to delay the meeting further was denied by the Court on that date and an application to Justice Douglas was also denied.

On April 30, 1962, the United States District Court for the Southern District of California, Central Division, spread their mandate, the effect of which was to *void* all of the proxies. At that time, objections were filed to spreading the mandate as follows:

I.

Title 15, Section 78n(a) U. S. Codes is unconstitutional in that it is too vague and indefinite to form the basis of any rule or regulation pursuant thereto and fails to set up any definite legislative standards for the Securities and Exchange Commission to follow. Therefore any order or judgment based upon this unconstitutional statute, or any regulation pursuant thereto, is void.

II.

No statute, rule or regulation authorizes cancellation of proxies. The order and judgment voiding the proxies of the Stockholders' Protective Committee and 1,200,000 votes by proxy is therefore void and in excess of the jurisdiction of the court.

III.

Section 78n(a) of Title 15, U. S. Codes, is in violation of the due process clause of the Fifth Amendment. U. S. Constitution in that it does not provide for notice and an opportunity to be heard by the stockholders who gave the proxies before their proxies were cancelled, and thus it took a property right away from them without notice and without an opportunity to be heard on whether they wanted their proxies cancelled.

IV.

Neither Section 78n(a) of Title 15, U. S. Codes, nor the regulations pursuant thereto provide for a notice and an opportunity to be heard by the stockholders whose rights and property are affected and who has a constitutional right to be heard.

V.

Section 78n(a) of Title 15. U. S. Codes, and the regulations issued pursuant thereto violate the First Amendment to the Constitution of the United States in that they deprive stockholders or their agents of freedom of speech and of the press guaranteed by the First Amendment. Therefore the judgment in this case, based upon an unconstitutional statute, and unconstitutional regulations pursuant thereto, is a nullity.

VI.

Regulation 14, 17 C. F. R., Section 240.14, promulgated thereunder are void because they are pursuant to the authority of Statute 15 U. S. C., Section 78n(a) which is itself unconstitutional as it is both an unlaw-

ful delegation of legislative functions and too vague and indefinite and uncertain to form a basis of criminal and civil sanctions.

VII.

The court erred in holding that the Securities and Exchange Commission, or any court on their application may interfere with and cancel the right of a stockholder to give a proxy of his shares of stock to vote his rights or to cancel the rights of proxy holders to vote those rights. Such a right is a property right protected by the due process clause of the Fifth Amendment to the Constitution of the United States.

At no time were the stockholders who gave the proxies notified by the Securities and Exchange Commission, nor were they represented or given an opportunity to be heard in the action to void their proxies. Some of the stockholders by affiadavit stated that they still wished to have their proxies voted and had not authorized anyone to revoke or invalidate their proxies. (See Appendix.)

A motion to stay the Stockholders annual meeting until this Court passed on this writ was denied by Justice Wm. O. Douglas. The solicitor-general stated, however, in his memorandum to the court, that if this Court reversed the judgment below it could nullify the election which took place May 9, 1962, and direct a new election be held.

Questions Presented.

I.

Whether Title 15, Section 78n(a), inherently and, as construed and applied in this case, is unconstitutional in that it constitutes an unlawful delegation of legislative power and authority to the Securities and Exchange Commission, and therefore violates the due process clause of the Fifth Amendment to the Constitution of the United States and violates the basic powers of separation of legislative, executive (administrative) and judicial departments of the Government.

II.

Whether Congress intended to give the Securities and Exchange Commission authority to apply censorship to letters and communications between stockholders and their agents and whether, if it did, such censorship constitutes a violation of and an abridgement of freedom of speech and of the press guaranteed by the First Amendment to the Constitution of the United States.

III.

Whether Section 78n(a), of Title 15, U. S. Codes, is so vague, indefinite and uncertain as to fail to set up an adequate standard of conduct which would form the basis of criminal or civil sanctions.

IV.

Whether Section 78n(a), of Title 15, U. S. Codes, is so vague, indefinite and uncertain as to fail to give any legislative standards to the Securities and Exchange Commission within the scope of its legislative authority.

V.

Whether the trial court erred in cancelling and disenfranchising 1,200,000 shares of stock by proxy and

whether the Circuit Court erred in affirming this cancellation. Whether such cancellation impaired the constitutional right of freedom of contract.

VI.

Whether, if jurisdiction does exist to censor proxies, the holders of the proxies should equitably be given an opportunity to correct any omissions without disenfranchising and voiding all of the proxies.

VII.

Whether the stockholders who gave the proxies had a right to be heard upon notice before the proxies which they gave were voided and whether Section 78n(a) of Title 15, U. S. Codes, inherently and as construed and applied in failing to give the stockholders an opportunity to be heard before their proxies were cancelled took away a property right from them in violation of the Fifth Amendment to the Constitution of the United States.

VIII.

Whether Section 78n(a) of Title 15, U. S. Codes, and the regulations issued pursuant thereto violate the Fifth Amendment to the Constitution of the United States in its due process clause in that it fails to provide for a notice and an opportunity to be heard by the stockholders whose rights and property are affected and who have a constitutional right to be heard.

IX.

Whether Section 78n(a) of Title 15, U. S. Codes, and the regulations issued pursuant thereto violate the First Amendment to the Constitution of the United States in that they deprive stockholders and/or their agents of freedom of speech and of the press guar-

anteed by the First Amendment to the Constitution of the United States; therefore, whether the judgment in this case based upon an unconstitutional statute and upon censorship and unconstitutional regulations pursuant thereto is a nullity.

X.

Whether Regulation 14, 17 C. F. R., and Section 240.14 promulgated thereunder are void because they are issued pursuant to Section 78n(a) of Title 15, U. S. Codes, which is itself unconstitutional as an unlawful delegation of legislative functions and too vague and indefinite and uncertain to form the basis of criminal and civil sanctions.

XI.

Whether the court erred in holding that the Securities and Exchange Commission, or any court on their application may interfere with and censor and cancel the right of a stockholder to give a proxy of his shares of stock, a property right to vote his rights, and whether the Securities and Exchange Commission or the court on their application may cancel the rights of proxy holders to vote those rights.

XII.

Whether such a right is property protected by the due process clause of the Fifth Amendment to the Constitution of the United States.

XIII.

Whether the findings of the District Court or Circuit Court are sustained by the evidence and whether they can or should support the judgment below.

Petitioners incorporate by reference all matters set out on the appendix as though fully set forth in this petition.

Reasons for Granting the Writ of Certiorari.

The questions involved in this case are among the most important questions of constitutional and statutory law as applied to stockholders coming before this court and involve questions of imperative public importance.

Constitutionality of Section 78n(a), Title 15, Challenged Jurisdiction to Censor Proxy Material and Cancel Proxies Does Not Exist.

This court has never heretofore determined the constitutionality of Section 78n(a) of Title 15, U. S. Codes, governing proxies nor the questions involved herein as to whether that section could constitutionally delegate all of the authority on which the Securities and Exchange Commission has assumed to act and on which it has acted nor has the question of censorship which the Securities and Exchange Commission has taken unto itself of all proxy material been authorized or passed upon by this court nor can we find any statute which gives a court of the United States jurisdiction to *cancel proxies* any more than it could seize books and destroy them because the material did not comport with its views.

S. E. C. Recognizes Questions as Important.

During the oral argument before the United States Court of Appeals at Los Angeles, California, counsel for the Securities and Exchange Commission stated that the question of validity of proxies is one of the most important questions before the Commission.

Findings Not Sustained by the Evidence.

The findings are not sustained by the evidence, and are contrary to the law and evidence. Twelve of the fifteen members of the Stockholders' Committee were

cleared and dismissed from the case. Yet their proxies were cancelled and they were restrained from acting under the orders of the court below.

The scope of the delegation of statutory authority to an administrative body was first voiced by this court in an exhaustive opinion by the late Justice Charles Evans Hughes in *Panama Refining Company v. Ryan*, 293 U. S. 388, 448, and in *Schechter Poultry Corporation v. United States of America*, 295 U. S. 495.

Delegation Unconstitutional.

Delegation by Congress of its essential legislative functions is precluded by the provisions of the Federal Constitution, Article I, Section I and of Article I, Sections 8 and 18, empowering Congress to make all laws which shall be necessary and proper for carrying into execution its general powers.

Panama Refining Company v. Ryan, 293 U. S. 421, 79 L. Ed. 446, 459.

As stated in the *Panama Refining Company* case:

"As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

Likewise, Title 15, Section 78n(a)

"declares no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions. . . ."

> "The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of Government."

As stated in *Schechter v. United States*, 295 U. S. 529:

> "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

Censorship Forbidden Violates First Amendment.

Nor has this court ever passed upon the constitutionality of the regulations issued by the Securities and Exchange Commission which constitute censorship of proxy material of stockholders and a voiding of the same based upon their censorship in violation of the First Amendment to the Constitution of the United States.

Both the Federal and State Constitutions contain guarantees of freedom of speech and of the press and it has been held that an invasion of the right of freedom of speech also offends the due process clause of the Fourteenth Amendment. Freedom from previous restraint or censorship is guaranteed in *Near v. Minnesota*, 283 U. S. 697, 76 L. Ed. 1357.

Fiske v. Kansas, 274 U. S. 380, 71 L. Ed. 1108;

Grosjean v. American Press Company, 297 U. S. 233, 80 L. Ed. 660.

The requirement of a license to speak or to distribute literature is invalid if used as the means of prohibition or censorship.

Lovell v. Griffin, 303 U. S. 444, 82 L. Ed. 949.

Stockholders of 1,200,000 Shares Disenfranchised.

The effect of the judgment of the District Court, affirmed by the Circuit Court, and its refusal to modify that judgment was to disenfranchise the owners of approximately 1,200,000 shares of stock.

It is stated by writers and the courts that:

> "The problem is to avoid disfranchisement of the innocent security holders who gave the violator their proxies"

In *Securities and Exchange Commission v. Trans-America Corporation*, 67 Fed. Supp. 326, at 329 (mofified and affirmed 163 F. 2d 511), the court did not void the proxies for violation of Securities and Exchange Commission regulations and held that the violations did not invalidate the proxies from use for the election of directors.

Conflict in Circuits.

This ruling of the District Court of the Third Circuit is in conflict with the holding of the Court of Appeals for the Ninth Circuit in this case and this court should grant certiorari to resolve the difference and establish the duty of the courts below under their equitable powers.

Equity Abhors Forfeitures. Correction, Not Cancellation, Should Be Permitted.

Like political elections, both sides in a proxy fight should have their chance to have their say uninterfered with or censored by the government. Like a Kennedy-Nixon debate, omission by one side to state any facts of value is sure to be met by statements from the other side covering the subject. In this case it is extremely

doubtful that the omitted matter, if or when conveyed to the stockholders, would change or cancel any proxies.

Why, then, did the S. E. C. step in to side with the management that would surely have been ousted by 1,200,000 share votes? The record is silent on this subject.

The government has no business or right to throw its weight on the side of management. No statute or regulation gives it such right, assuming that the Constitution would permit it.

We challenge S. E. C.'s jurisdiction and the jurisdiction of the courts in this respect under the First and Fifth Amendments to the U. S. Constitution to interfere or cancel proxies. Congress has not yet given this power of restraint and censorship to the S. E. C. or the courts. Nor if it did, has the constitutionality of such authority been passed upon. We think this presents fundamental questions for this court to rule upon and request that it does so by granting this petition for a writ of certiorari.

Since the proceedings in this case were equitable, the court should not have disfranchised the innocent security holders and should have permitted the Stockholders' Protective Committee to have sent out letters to the stockholders who gave their votes before arbitrarily and capriciously cancelling the proxies. See

Securities and Exchange Commission v. Trans-America Corporation, 163 Fed. Supp. 511 (cert. denied 332 U. S. 847);

State ex rel. Pugh v. Meredith, 183 Iowa 783, 790, 167 N. W. 626, 628.

In the *Pugh* case, the court refused to invalidate proxies solicited in violation of a statute prohibiting any soliciting of proxies by agents of the company. The court said:

> "One sufficient reason for this holding is that the statute does not expressly or by implication provide for such result * * * The purpose of the statute forbidding such solicitation is not to disfranchise the member or members so solicited, but rather to prohibit and punish the mis-use by agents of their position in the organization to promote the selfish interest of themselves or of others." See also:
>
> *Securities and Exchange Commission v. Okin*, 58 Fed. Supp. 20, 132 F. 2d 784.

Censorship of stockholder's rights to sign proxies is just as abhorrent to the concept of freedom of speech and of the press guaranteed by the first amendment to the Constitution of the United States as is censorship of movies, books, plays, pictures, magazines. *Kingsley Corp. v. Regents of U. of N. Y.*, 360 U. S. 684, 697, 3 L. Ed. 2d 1512, 1521. In that case Mr. Justice Douglas, with whom Mr. Justice Black joins, concurring in a moving picture case, said:

> "While I join in the opinion of the Court, I adhere to the views I expressed in *Superior Films, Inc. v. Department of Education*, 346 U. S. 587, 588, 589, 98 L. ed. 329, 331, 74 S. Ct. 286, that censorship of movies is unconstitutional, since it is a form of 'previous restraint' that is as much at war with the First Amendment, made applicable to the States through the Fourteenth, as the censorship struck down in *Near v. Minnesota*, 283

U. S. 697, 75 L. ed. 1357, 51 S. Ct. 625. If a particular movie violates a valid law, the exhibitor can be prosecuted in the usual way. I can find in the First Amendment no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play, or previewing a movie."

Shall we now add on behalf of the stockholders of America "or censoring proxy material or proxy statements previous to their use by the stockholder or his agent."

Shall we permit "previous restraint" of the letters and writings of those seeking the votes of stockholders or their proxies, any more than we would require the submission to the registrar of voters to censor letters sent out to the voters at an election?

In this same case the court said that it did not consider the appellant's contention that the state is entirely without power to require film of any kind to be licensed prior to their exhibition. We contend that neither Congress nor the Securities and Exchange Commission have the power to require stockholders or their agents to whom they send proxies to secure what amounts to a license to circulate proxy solicitation letters and proxies before they are able to do so.

"The First Amendment says in no equivocal language that Congress shall pass no law abridging freedom of speech, press, assembly or petition."

Barenblatt v. U. S., 360 U. S. 109, 140, 3 L. Ed. 2d 1115, 1137.

For violations of the law there are criminal sanctions just as there are for libel.

Vagueness and Uncertainty of Section 78n(a).

Another important question raised by this petition which has not been passed upon by this court but which this court should determine, is whether Section 78n(a) of Title 15, U. S. Code is so vague as to be unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States. Bearing in mind that this section carries with it criminal penalties for its violation, we must examine it in the light of the cases covering vagueness.

See:

Lanzetta v. New Jersey, 306 U. S. 451, 83 L. Ed. 888;

Winters v. New York, 33 U. S. 507, 515, 92 L. Ed. 840, 849;

Jordan v. De George, 341 U. S. 223, 230, 231, 95 L. Ed. 886, 891, 892;

Musser v. Utah, 333 U. S. 95, 97, 92 L. Ed. 562, 565;

Scull v. Virginia, 359 U. S. 344, 3 L. Ed. 2d 865.

Lack of Due Process on Behalf of Stockholders.

At no time were the stockholders made a party to the proceedings to cancel their proxies. The Securities and Exchange Commission did not make them a party to the action to cancel their proxies and they were not represented by counsel, either individually or in a representative capacity.

Procedural due process of law requires notice and an opportunity to be heard:

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;

Lambert v. California, 355 U. S. 225, 2 L. Ed. 2d 228;

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865;

Covey v. Somers, 351 U. S. 144, 100 L. Ed. 102;

Walker v. Hutchinson, 352 U. S. 112, 1 L. Ed. 2d 178.

The Famous Boyd Case, 116 U. S. 616.

In *Boyd v. United States*, 116 U. S. 616, the Supreme Court of the United States held unconstitutional the seizure and destruction of goods taken by the Government in violation of customs regulations. If the Government could not summarily seize and destroy goods in violation of a statute of the United States, how can it destroy proxies without any statute and without any regulation providing either for notice and an opportunity to be heard to the person who gave the proxy?

Furthermore, the proxies are themselves property and cannot be taken or condemned by the Government, thus disenfranchising the owners or givers thereof.

Holders of shares equal to approximately 1,200,000 votes (sufficient to constitute a practical majority of the votes expected to be cast at the annual meeting) signed and returned the proxies of the Stockholders Protective Committee. Practically none of these proxies were cancelled or withdrawn by the stockholders who gave them. The Securities and Exchange Commission,

without notice to these stockholders and without any participation by the stockholders, sought court action to void the proxies and their petition was granted.

After the judgment of the District Court had been upheld, with modifications by the Court of Appeals, the Stockholders' Protective Committee sought to have the court under its equitable powers permit the Stockholders' Protective Committee to send out letters to all of the stockholders who gave proxies with an explanation of what had happened and ask if the stockholders still wanted to leave their proxies stand or whether they wanted to withdraw or cancel them. This motion was denied by the Circuit Court. We ask this court to review and reverse this order.

Cancellation of proxies, secured at a cost of many thousands of dollars, and not chargeable to the company, is too severe and inequitable, and unjust.

Liberty of Contract Violated.

The action of the Securities and Exchange Commission violated a fundamental provision of constitutional law; namely, liberty of contract which inheres in the First and Fifth Amendments to the Constitution of the United States although it is specifically forbidden to the states in Article I, Section 10 of the Constitution of the United States.

In *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, a corporate charter was held to be a contract and stockholders of a corporation have, in effect,

a contract with the corporation to be allowed to vote or to give their proxy to vote. Section 78n(a) of Title 15 and the regulations pursuant thereto would arbitrarily impair this right, and did so in this case. See also

Louisville, etc., Bank v. Radford, 295 U. S. 555, 79 L. Ed. 1593.

Important Questions for This Court to Decide.

The questions presented by this petition are substantial Federal questions of importance which have not been, but should be, decided by this court. They also present conflicting views of various courts and this court should decide the questions herein to establish uniformity.

Prayer.

Wherefore, petitioners pray that this Honorable Court grant its appropriate writ of certiorari directed to the Court of Appeals for the Ninth Circuit and that it hold:

I.

That Section 78n(a) unconstitutionally delegates its statutory authority to the Securities and Exchange Commission.

II.

That the Securities and Exchange Commission has no jurisdiction to censor proxy material or proxy statements or to control the material sent to or from stockholders by corporations or by other stockholders with whom it is in privity.

III.

That the nullification and cancellation of proxies is unconstitutional and void and that the judgments and orders based thereon are void.

IV.

That Section 78n(a) inherently and as construed and applied in this case violates the First Amendment to the Constitution of the United States, as do the regulations pursuant thereto.

V.

That Section 78n(a) inherently and as construed and applied in this case violates the due process clause of the Fifth Amendment to the Constitution of the United States.

VI.

That Section 78n(a) inherently and as construed and applied in this case constitutes an unlawful and unconstitutional delegation of the powers of Congress to the Securities and Exchange Commission.

VII.

That the remedy imposed by the court, if consitutional, is too severe and inequitable and that correction, and not cancellation, was the equitable and proper remedy.

VIII.

That if the court upholds the constitutionality of the statute and regulations pursuant thereto that it void the stockholders' meeting and allow either the use of proxies already obtained or a letter to go to the givers of the proxies permitting the withdrawal of the proxies in the event that the proxy giver still wishes to do so.

IX.

That the court set a new date for holding a valid stockholders' meeting at which the rights of the stock-

holders and those to whom they have given the proxies herein or to whom they wish to give their proxies may be exercised.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners.

VAUGHAN, BRANDLIN, ROBINSON & ROEMER,

As of Counsel.